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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-422

INTERNATIONAL ENGINEERING COMPANY, A Division of A-T-O, INC., *Petitioner,*

v.

DONALD H. RUMSFELD, Secretary of Defense, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

ROBERT H. TURTLE
1700 K Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

Of Counsel:

F. TROWBRIDGE VOM BAUR
JAMES M. MCHALE
DAVID S. COHEN
VOM BAUR, COBURN, SIMMONS & TURTLE
1700 K Street, N.W.
Washington, D.C. 20006

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PRELIMINARY STATEMENT

This Memorandum is filed in reply to Respondents' Memorandum dated November, 1975.

ERRORS IN RESPONDENTS' FACTUAL STATEMENT

Respondents make two major erroneous assertions of fact:

A. Respondents assert that Petitioner's contract, which Respondents erroneously characterize as a "licensing agreement" (Resp. Mem. 5), required Petitioner to give the Air Force the data which it later de-

cided to disclose to Petitioner's competitors (Resp. Mem. 2). But the District Court specifically found to the contrary. Finding of Fact No. 45; Conclusion of Law No. 3. Pet. App. C-17-18. Petitioner furnished the data at issue to the Air Force at its request for evaluation purposes only. The District Court found that the Air Force never had any contractual right or "license" to disclose Petitioner's trade secrets. The Court of Appeals did not disturb this finding of the District Court.

B. Petitioner did not, as Respondents imply, (Resp. Mem. 3) ask the District Court to enjoin a contracting officer's decision. Indeed, the District Court found that the decision to disclose Petitioner's data was considered at the highest levels of the Air Force by officials who included the Secretary, the Air Force Chief of Staff, the Commander, Air Force Systems Command, and the Commander, Electronic Systems Division. District Court Findings of Fact Nos. 37-43, Pet. App. C-15-17. Thus, the final determination to release Petitioner's trade secrets clearly represents action of the highest levels of the Air Force—not the action of the contracting officer.

ERRORS IN RESPONDENTS' LEGAL ARGUMENT

Respondents make essentially three points:

1. Respondents contend that the central issue is whether the Air Force breached a contract clause by deciding to disclose Petitioner's trade secrets without holding a prior hearing. Indeed, Respondents make the bizarre assertion that the Air Force's failure to give Petitioner a hearing is only "a contract claim in constitutional verbiage." Resp. Mem. 5.

But Petitioner's rights in its trade secrets and its remedies to protect those trade secrets are not derived from any contract. Respondent's memorandum is strangely silent as to the due proces clause of the Fifth Amendment, and the provisions of Armed Services Procurement Regulation Section IX, Part 2 which are regulatory, not contractual—and on which Petitioner relies. Pet. 20-22. Thus, this case falls within the jurisdiction of the district courts, which have always had the power to grant relief to provide protection against due process violations by Government officials. *See, e.g., Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Greene* v. *McElroy*, 360 U. S. 474 (1959).[1]

2. Respondents assert that the Administrative Procedure Act does not apply to this case because Petitioner has an adequate remedy in an action at law for damages[2] for breach of contract in the Court of Claims. Resp. Mem. 6-7.

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[1] It must be emphasized that the Defense Department has promulgated a *regulatory*, not a contractual, scheme to balance conflicting interests in data disclosed to Department officials. For example, the decision to release privately originated data in a competitive procurement is governed by the regulatory provisions of ASPR 1-304.1 and ASPR § IX, Part 2. *See*, 32 C.F.R. § 1.304-1 (1974). Regulations, not contract clauses, also control specific dealings between individual companies and the Department. For example, Petitioner's offer to sell its data, which Respondents briefly mention (Resp. Mem. 6, fn. 7), and any negotiations concerning that offer are not governed by a contract clause but instead are governed by a regulation, ASPR 9-202.2(f), 32 C.F.R. § 9.202.2 (f) (1974). An antecedent version of this regulation appears at Pet. App. E-11-12.

[2] In a footnote, Respondents assert that Petitioner's offer to negotiate a sale of its data under ASPR § 9-202.2(f) indicates that the data's value can be ascertained. Resp. Mem. 6, fn. 7. But Petitioner's offer does not even suggest that Petitioner could provide adequate proof in a breach of contract action of the damages it would suffer if its data were disclosed.

The amazing feature of Respondents' assertion is that they have no answer whatever to make to the massive collection of cases cited in our Petition holding that an action at law for damages is not an adequate remedy for the threatened disclosure of trade secrets. *See* Pet. 16. There being no adequate remedy at law, equitable relief is proper.

Moreover, Respondents' assertion that the "adequacy" of a remedy in the Court of Claims "do(es) not warrant further review" because it "raise(s) essentially factual issues," is in error. Resp. Mem. 7, fn. 9.

The Court of Appeals' holding on the "adequacy" of an action in the Court of Claims does not depend on any finding of fact by the District Court. Pet. App. A-14-15. To the contrary, the District Court's findings support Petitioner's contention that damages do not provide an adequate remedy. *See*, Finding of Fact No. 47, Pet. App. C-17. *See also*, Conclusion of Law No. 8, Pet. App. C-19-20.

The Court of Appeals ruled as a matter of law that damages are an adequate remedy for the Government's disclosure of data. This ruling extinguishes the District Court's jurisdiction even to consider, whether as a matter of fact, a damages award could actually provide adequate compensation to the originator of illegally disclosed trade secrets. Whether the District Court has *jurisdiction* to determine if damages are an "adequate remedy" for the illegal disclosure of trade secrets by the Government, is not a "factual" issue. It is a legal issue, that is before this Court in a case

whose facts will recur again and again.[3] And, see *Stratton* v. *St. Louis Southwestern Railway Co.*, 284 U.S. 530, 534 (1932).

3. Respondents contend that the decision by Air Force officials to disclose Petitioner's trade secrets did not constitute "agency action." Resp. Mem. 6. But they have not cited any authority in support of their assertion.

Interestingly enough, Respondents do not dispute that the express terms of the Administrative Procedure Act show that the decision to disclose Petitioner's trade secrets was "agency action." The APA includes "sanctions" in its definition of "agency action." "Sanctions" are defined in part as the "*destruction*, taking, seizure, or withholding of property." (emphasis added) 5 U.S.C. § 551 (10)(D) (1970) (Pet. App. E-1). The District Court held that the "destruction" of Petitioner's property rights in its trade secrets would be the inevitable consequence of the decision to

[3] Indeed, the same question has already arisen in another case where a developer of machine components attempted to enjoin the Government's disclosure of its trade secrets. The contractor's motion for a preliminary injunction was denied on the authority of the Court of Appeals' opinion in our case. The contractor's appeal is now pending before the D.C. Circuit. *Computer Machining Technology Corporation* v. *Schlesinger*, No. 75-1927 (D.C. Cir.). *See also, Planning Research Corporation* v. *Federal Power Commission*, No. 75-1540 (D.C. Cir.) (appeal pending) where the plaintiff sued to enjoin the FPC's compliance with a Freedom of Information Act request for confidential data. PRC had submitted the data in a technical proposal that was later incorporated by reference into a contract between PRC and the FPC. The District Court ruled that the case was basically a dispute over a contract. It dismissed for lack of jurisdiction, citing the Court of Appeals' decision in our case.

remove Petitioner's restrictive legends from its data and disclose it to Petitioner's competitors. See District Court Conclusion of Law No. 9, Pet. App. C-20. The Court of Appeals did not question this holding.

Respondents also assert that there is no case which construes the APA as "a means for avoiding the jurisdiction of the Court of Claims." Resp. Mem. 6. But Petitioner makes no such contention. On the other hand, there is no case which holds that review under the Administrative Procedure Act should not be allowed when there is no adequate remedy in the Court of Claims for illegal agency action. And we have shown that an action at law for breach of contract in the Court of Claims would be totally inadequate as a remedy for the threatened disclosure of Petitioner's trade secrets. Pet. 14-19.[4]

Finally, Respondents do not deny that issues of true public importance are raised by this case.[5] This Court

[4] Respondents imply that Petitioner has failed to exhaust an administrative remedy before the Board of Contract Appeals. Resp. Mem. 6. The District Court found that no such remedy was available to Petitioner. Pet. App. D-8. The Court of Appeals did not question this finding of the District Court, and it is still the law of the case.

[5] This case has been the subject of extensive commentary from the publication of the first District Court opinion to the filing of the petition for certiorari. *See*, e.g., *BNA Federal Contracts Report* No. 599, September 29, 1975, which reprinted lengthy excerpts from the petition for certiorari at D-1-5; 17 *The Government Contractor* ¶ 237, No. 12, June 19, 1975, which characterized the Court of Appeals' decision as a "landmark," at 6; BNA *Federal Contracts Report* No. 580, May 12, 1975 at A-1; BNA *Federal Contracts Report* No. 562, December 30, 1974 at K-10-11; BNA *Federal Contracts Report* No. 553, October 28, 1974 at A-7; BNA *Federal Contracts Report* No. 512, January 7, 1974 at K-1-3; BNA *Federal Contracts Report* No. 504, November 5, 1973 at A-1; BNA *Federal Contracts Report* No. 490, July 23, 1973 at A-3-5; 16 *The Government Contractor* ¶ 81, No. 5, March 4, 1974; 15 *The Government Contractor* ¶ 357, No. 19, September 17, 1973; J. Whelan & R. Pasley, *Cases and Materials on Federal Government Contracts* 307 (1975).

should grant a writ of certiorari to restore the proper jurisdictional boundaries between the district courts and the Court of Claims, and to protect the rights of individuals who have disclosed data worth billions of dollars to the Government with the clear understanding that such data would be protected in accordance with Departmental Regulations. See *Brief of the National Security Industrial Association as Amicus Curiae in Support of the Petition* at 4-15.

Respectfully submitted,

ROBERT H. TURTLE
1700 K Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

Of Counsel:

F. TROWBRIDGE VOM BAUR
JAMES M. MCHALE
DAVID S. COHEN
VOM BAUR, COBURN, SIMMONS & TURTLE
1700 K Street, N.W.
Washington, D.C. 20006

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